In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 900

KELLER & GOETZ, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 337(a) of the Internal Revenue Code of 1954 provides an exception from the rule that a corporation, like any other taxpayer, must recognize the gain or loss realized on the sale of property. Under this section, if "a corporation adopts a plan of complete liquidation" and "within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation * * *," then "no gain or loss

shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period."

The question in this case is whether the gain realized by petitioner from the condemnation of its property was excluded from income under Section 337 (a). The condemnation of property clearly constitutes a sale for the purposes of Section 337, *Hawaiian Gas Products* v. *Commissioner*, 126 F. 2d 4, 5 (C.A. 9), certiorari denied, 317 U.S. 653; *Wendell* v. *Commissioner*, 326 F. 2d 600, 602 (C.A. 2), and it is conceded that petitioner executed a plan of liquidation within 12 months of the adoption of the plan. The issue here is whether the sale by condemnation of petitioner's property took place *after* the adoption of the plan, so as to exempt the gain under Section 337 (a), or whether the condemnation sale took place *before* adoption of the plan, so as not to qualify for the exemption under Section 337(a).

Revenue Ruling 59-108, 1959-1 Cum. Bull. 72, 74, holds that the time at which a condemnation sale takes place is to be decided on an examination of the particular condemnation statute, and that—

> The obligation of the condemning authority should therefore be treated as fixed upon any such taking which transfers the title to the property and creates an immediate obligation upon the condemning authority to pay just compensation, even though the amount of the compensation remains to be determined and paid at a later date.

The New York statute applicable to this case (24 McKinney's Consolidated Laws of New York Annotated, Section 30) provides that "appropriation by the state * * * shall be deemed complete and the title to such property shall be vested in the people of the state of New York" when a description of the property and a map are filed by the superintendent of public works in the office of the county clerk or register where the property is located (Pet. App. 13). Since the map and description were filed in this case *before* the plan of liquidation was adopted, the condemnation sale did not come within Section 337(a). The Court of Appeals for the Second Circuit and the Tax Court have reached this conclusion in this and similar cases. *Wendell* v. *Commissioner*, 326 F. 2d 600 (C.A. 2); *Dwight* v. *United States*, 328 F. 2d 973 (C.A. 2); *Driscoll Bros. & Co.* v. *United States*, 221 F. Supp. 603 (N.D. N.Y.), appeal to the Second Circuit dismissed by taxpayer, April 21, 1964; *84 Woodbine Street Realty Corp.* v. *Commissioner*, decided by the Tax Court, September 26, 1963 (P-H Memo T.C., par. 63,262), appeal to the Second Circuit dismissed by the taxpayer, March 20, 1964. See also *Commissioner* v. *Kieselbach*, 127 F. 2d 359 (C.A. 3), affirmed as to another issue, 317 U.S. 399, where the court held that for the purposes of computing the holding period of a capital asset the owner ceased to hold it at the date of the order vesting title in the condemning authority.

There is no conflict. *Henderson* v. *United States* (W.D. Wash.), decided October 5, 1964 (64-2 U.S. T.C., par. 9799), and *Towanda Textiles, Inc.* v. *United*

States, 180 F. Supp. 373 (Ct. Cl.), cited by the petitioner, both related to involuntary conversions taking place within 12 months *after* the plans of liquidation were adopted.

The fact that under other (unspecified) statutes in New York or elsewhere the sale may occur at a later stage of the condemnation proceedings does not, contrary to petitioner's suggestion (Pet. 7), create a constitutional infirmity, nor are constitutional questions raised by the fact that other taxpayers differently situated may qualify for the Section 337(a) exception while petitioner may not. See *Phillips* v. *Commissioner*, 283 U.S. 589, 602; *Poe* v. *Seaborn*, 282 U.S. 101, 117-118.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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